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11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA
13 WESTERN DIVISION

14 MEDSQUIRE, LLC,
15 Plaintiff,
16 v.

17 SPRING MEDICAL SYSTEMS,
18 INC.; QUEST DIAGNOSTICS, INC.;
19 NEXTGEN HEALTHCARE
20 INFORMATION SYSTEMS, INC.;
21 HENRY SCHEIN MEDICAL
22 SYSTEMS, INC.; HEWLETT-
23 PACKARD COMPANY; APRIMA
24 MEDICAL SOFTWARE, INC.;
eCLINICALWORKS, LLC;
MED3000, INC.; PULSE SYSTEMS,
INC.; COMPULINK BUSINESS
SYSTEMS, INC.; NEXTECH
SYSTEMS, INC.; NAVINET, INC.;
successEHS, INC.; athenaHEALTH,
INC.,

25 Defendant.

Case No. CV11-4504-jhn (PLAx)

**DEFENDANT QUEST
DIAGNOSTICS INCORPORATED
AND JOINING DEFENDANTS'
JOINT REPLY IN SUPPORT OF
QUEST'S MOTION TO DISMISS
UNDER FED. R. CIV. P. 12(b) (6)**

Original Hearing Date: Aug. 22, 2011

Re-Noticed Date: Sept. 12, 2011

Time: 2:00 p.m.

Courtroom: 790

Judge: Hon. Jacqueline H. Nguyen

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I. INTRODUCTION

Plaintiff Medsquire's three-page Opposition (Doc. No. 65) to Defendant Quest's Motion to Dismiss (Doc. No. 41), offers no substantive defense of the Complaint's conclusory, factually-devoid infringement allegations. Rather, the Opposition rests on the faulty legal premise that "the *Twombly* and *Iqbal* decisions do not change the established pleading standard." Pl.'s Opp'n at 3:8-9. This Court rejected this argument in *Smartmetric* and *Clayton*,¹ yet Medsquire does not acknowledge—let alone attempt to distinguish—these, or other numerous contrary decisions which are cited in Quest's Motion (except for one case discussed below).

Instead, the Opposition misrepresents Quest's arguments, and does not respond to Quest's actual arguments showing how the Complaint fails to meet the *Twombly-Iqbal* plausibility standard. Medsquire's other miscellaneous arguments—for example, it has offered to provide an infringement claim chart to the defendants—are meritless. Nor is there any support for Medsquire's allegation of default by the eleven Defendants that joined Quest's Motion. Plaintiff's Opposition lacks merit, and the Complaint should be dismissed.

II. ARGUMENT

A. Medsquire Misrepresents Quest's Arguments and Fails to Respond to Them.

As an initial matter, Medsquire's Opposition contains several significant misrepresentations of Quest's arguments that require correction.

First, without providing any citation, Medsquire erroneously asserts that "Quest acknowledges that the Complaint satisfies the pleading standard set forth in Rule 8 and Form 18 of the Federal Rules of Civil Procedure." Pl.'s Opp'n at 2:5-6.

¹ The Court's orders in *Smartmetric Inc. v. MasterCard Inc.*, No. 2:10-cv-01864, slip op. (C.D. Cal. July 8, 2010) ("*Smartmetric*"), and *Clayton v. Fisher Price, Inc.*, No. 2:09-cv-06891, slip. op. (C.D. Cal. June 1, 2010) ("*Clayton*"), were submitted as Exs. 1 and 2. (Doc. Nos. 41-3, 41-4.) Numerical Exhibits referred to herein are exhibits attached to the Declaration of D. James Pak In Support of Quest's Motion to Dismiss. (Doc. No. 41-2.)

1 Medsquire repeats its assertion that “the Complaint easily satisfies the Rule 8 pleading
2 standard, and Quest does not contend otherwise.” *Id.* at 3:17-18. These statements
3 misrepresent Quest’s arguments. As summarized below, Quest argued the exact
4 opposite.

5 Quest’s Motion or supporting Memorandum makes no “acknowledgement” that
6 Medsquire’s Complaint satisfies the pleading standard set forth in the rules.
7 Medsquire cannot provide any citation to support its faulty assertions because Quest
8 made no such “acknowledgement.” To the contrary, Quest argued that in view of (i)
9 the Supreme Court’s decisions in *Twombly* and *Iqbal*; (ii) this Court’s orders in
10 *Smartmetric* and *Clayton*; and (iii) additional decisions from other courts in this and
11 other districts, Medsquire’s Complaint *fails* to satisfy the pleading standard set forth
12 in Rule 8 of the Federal Rules of Civil Procedure and applicable case law. *See, e.g.,*
13 Quest’s Mem. In Support of Quest’s Motion to Dismiss (“Quest’s Mem.”), at 4, 6-9.
14 (Doc. No. 41-2.) Quest’s opening Memorandum expressly argues that Rule 8 requires
15 “a showing, rather than a blanket assertion of, entitlement to relief . . . that is plausible
16 on its face,” and that Medsquire’s conclusory legal assertions are devoid of any factual
17 allegations and fail “to show the requisite plausibility of its claims under the
18 *Twombly-Iqbal* pleading standard.” *Id.* at 4:15-19; 1:18-19 (citations omitted).

19 Second, Medsquire inexplicably asserts that “no defendant asserts that the
20 infringement allegations are not ‘plausible in [*sic*] its face.’” Pl.’s Opp’n at 3:23-24.
21 (Doc. No. 65.) This statement does not make any sense. Quest argued *in passim* in its
22 opening brief that Medsquire’s infringement allegations fail to show the plausibility of
23 Medsquire’s claims.² On the very first page of its brief, Quest argued,

24 Medsquire’s Complaint fails to adequately inform Quest as to the nature
25 of Medsquire’s claims and simply fails to show the requisite plausibility
26 of its claims under the *Twombly-Iqbal* pleading standard.

27
28 ² The words “plausible” or “plausibility” appears sixteen (16) times in Quest’s fifteen-
page brief.

1 Quest's Mem. at 1:16-19 (emphasis added). With respect to Medsquire's direct
2 infringement claims, Quest argued,

3 Medsquire's Complaint makes no attempt to identify what component(s)
4 or aspect(s) of the Care360 system allegedly infringe(s) any of the 24
5 method claims (including 7 independent claims) of the '526 patent.
6 Medsquire's Complaint does not provide any factual allegations to show
7 the plausibility of its claims whatsoever.

8 *Id.* at 7:2-6 (emphasis added). *See also, id.* at 7:24-25. With respect to Medsquire's
9 inducement claim, Quest argued that Medsquire's Complaint

10 offers no facts to support Medsquire's conclusory assertion that Quest
11 had knowledge of the '526 patent. It also contains no factual allegation
12 suggesting that Quest knew or was willfully blind to facts suggesting that
13 its actions would induce direct infringement of the '526 patent by others.
14 . . . There is simply no factual content from these allegations to infer that
15 Medsquire's inducement claim is plausible.

16 *Id.* at 9:23-27; 10:20-21 (emphasis added). With respect to Medsquire's contributory
17 infringement claim, Quest argued that Medsquire's allegations (i) do not provide any
18 factual bases for Medsquire's conclusory claims regarding "the knowledge of the '526
19 patent," "non-staple article" and "an infringing system or method," and (ii) thus
20 "cannot show any plausibility of Medsquire's contributory claim." *Id.* at 11:10-14;
21 11:21-23 (emphasis added). In light of these multiple and unambiguous arguments in
22 Quest's Memorandum, Medsquire's misrepresentation that "no defendant asserts that
23 the infringement allegations are not 'plausible in [*sic*] its face,'" is untenable.

24 Medsquire's misrepresentation of Quest's arguments is significant and
25 dispositive of the instant motion, because on the basis of this erroneous assertion,
26 Medsquire concludes that "Nothing more is required." Pl.'s Opp'n at 3:24. Instead of
27 offering any specific, substantive response to Quest's failure to show plausibility
28 arguments, Medsquire conclusorily insists that its "Complaint easily satisfies the Rule

1 8 pleading standard.” Pl.’s Opp’n at 3:17. Medsquire’s explanation, copied below, is
2 just as conclusory and just as deficient as its allegations in the Complaint that are
3 subject to Quest’s Motion:

4 [t]he Complaint . . . states what each defendant does to directly infringe
5 the patent, . . . what each defendant does to contribute to and induce
6 infringement of the patent, and it recites each element for each cause of
7 action.

8 *Id.* at 3:18-23. Yet, Medsquire did not identify in its Complaint, and does not identify
9 in its Opposition, “what each defendant does to directly infringe” and “what each
10 defendant does to contribute to and induce infringement of the patent.”

11 As discussed in Quest’s Memorandum, Medsquire’s allegations comprise
12 almost entirely of legal conclusions without any factual content that would suggest the
13 plausibility of its claims. Other than an allegation that Quest makes, uses, sells and/or
14 offers to sell its Care360 system, there is no factual content concerning “what [Quest]
15 does” to infringe directly or indirectly. As the Supreme Court and this Court have
16 repeated, “[t]hreadbare recitals of the elements of a cause of action, supported by mere
17 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct.
18 1937, at 1949-50; *accord Clayton*, slip op. at 3, Ex. 2 at 14. (Doc. No. 41-4.) As a
19 result of these deficiencies, Medsquire’s Complaint is insufficient to provide Quest a
20 fair notice of Medsquire’s claims and should be dismissed.

21 **B. Medsquire’s Opposition Is Based On Rejected Legal Premises.**

22 With no factual content in its Complaint to support its direct and indirect
23 infringement claims, Medsquire bases its Opposition on the faulty legal premises that
24 “the *Twombly* and *Iqbal* decisions do not change the established pleading standard,”
25 and that “California courts cannot unilaterally adopt more stringent pleadings
26 standards.” Pl.’s Opp’n at 3:8-9; 4:3-4. This is contrary to the settled law and this
27 Court’s order in *Smartmetric*.

28 This Court noted in *Smartmetric* that “the ‘plausible claim for relief’ standard

1 from *Iqbal* alters the evaluation of the sufficiency of a complaint...” Ex. 1 at 8 n. 2
2 (emphasis added) (citation omitted). (Doc. No. 41-3.) Contrary to Medsquire’s
3 contention, the U.S. Supreme Court – not California courts – provided the guidelines
4 for evaluating the sufficiency of a complaint. Medsquire’s Opposition completely
5 ignores and does not discuss this Court’s decisions in *Smartmetric* and *Clayton*, and
6 the many other decisions cited in support of Quest’s motion.³ These cases uniformly
7 reject Medsquire’s contentions in its Opposition.

8 Medsquire erroneously asserts that “any claim for patent infringement
9 containing the level of specificity set forth in Form 18 satisfies Rule 8 as interpreted in
10 the *Twombly* and *Iqbal* decisions.” Pl.’s Opp’n at 3:13-15 (emphasis added). This is
11 wrong and insupportable. When examining the sufficiency of pleadings to support
12 indirect infringement claims, the courts almost uniformly held that the level of
13 specificity in Form 18 does not satisfy the pleading requirement. For example, in an
14 opinion cited in and submitted as an attachment to Quest’s motion, Judge Pfaelzer
15 held that:

16 Because Form 18 does not model patent claims and counterclaims other
17 than claims for direct infringement, Rule 8 will not require a court to
18 accept as sufficient other claims. . . . Therefore, this Court agrees with
19 those district courts that have held that claims of indirect infringement
20 must be pleaded subject to the requirements of Federal Rules of Civil
21 Procedure 8(a)(2) as interpreted by the Supreme Court in *Twombly* and
22 *Iqbal*. Thus, to survive the motion to dismiss, the claims for indirect
23 infringement “must contain sufficient factual matter, accepted as true, to
24

25 ³ Medsquire appears to be critical of Magistrate Judge Seeborg’s opinion in *Elan v.*
26 *Microelec. Corp. v. Apple, Inc.*, 2009 U.S. Dist. LEXIS 83715 (N.D. Cal. Sept. 14,
27 2009). That opinion was cited with approval by this Court in *Smartmetric*. Ex. 1, at 6.
28 Medsquire attempts to distinguish the instant case by noting that Apple failed to plead
the additional elements required to assert claims of contributory infringement and
inducement.” Pl.’s Opp’n at 4. However, this is precisely what Quest argued: that
Medsquire’s Complaint fails to plead elements required to assert claims of
contributory infringement and inducement. Quest’s Mem. at 9-14.

1 ‘state a claim to relief that is plausible on its face.’”
2 *Microsoft Corp. v. Phoenix Solutions, Inc.*, No. 2:10-cv-03846, slip op. at 3 (C.D. Cal.
3 Nov. 4, 2010) (citations omitted), Ex. 4 at 26. (Doc. No. 41-6.) *See also, Weyer v.*
4 *MySpace, Inc.*, No. 2:10-cv-00499, slip op. at 4 (C.D. Cal. June 17, 2010), Ex. 5 at 33
5 (Doc. No. 41-7); *Elan Microelects. Corp. v. Apple, Inc.*, No. C 09-01531, 2009 U.S.
6 Dist. LEXIS 83715, at *6-7 (N.D. Cal. Sept. 14, 2009). This Court adopted the same
7 approach in dismissing indirect infringement claims and in requiring more details than
8 found in Form 18 in *Clayton v. Fisher Price, Inc.*, No. 2:09-cv-06891, slip. op. at 3-5,
9 Ex. 2 at 14-16. (Doc. No. 41-4.)

10 Against this weight of authority, Medsquire misinterprets *Mark IV Industries,*
11 *Corp. v. Transcore LP*, 2009 U.S. Dist. LEXIS 112069 (D. Del. Dec. 2, 2009), in
12 support of its contention that “any claim for patent infringement containing the level
13 of specificity set forth in Form 18” is sufficient. Pl.’s Opp’n at 3:13-16. That opinion
14 from Delaware – which is not binding on this Court – makes clear that Judge Sleet
15 was addressing allegations for a direct infringement claim only, not any and all claims
16 for patent infringement as Medsquire asserts. *See Mark IV*, 2009 U.S. Dist. LEXIS
17 112069, at *7-8 (“Mark IV also avers that . . . that TransCore directly infringes these
18 patents. . . The court disagrees that *Iqbal* has such an effect on pleading direct patent
19 infringement.”).

20 According to this Court and many other courts cited in Quest’s motion,
21 however, indirect infringement claims must contain sufficient factual allegations to
22 show the plausibility of the indirect infringement claims. Medsquire’s Complaint
23 does not provide sufficient factual allegations (i) to show that Quest and the Joining
24 Defendants had the requisite knowledge of the patent-in-suit and a specific intent to
25 encourage others to infringe, (ii) to show that the accused products are non-staple
26 articles incapable of substantial non-infringing use, or (iii) to identify specific
27 instances of direct infringement. *See Quest’s Mem.* at 9:6-10:2; 10:25-11:23; 13:4-
28 14:12. Accordingly, Medsquire’s allegations relating to the alleged indirect

1 infringement claims do not meet the *Twombly-Iqbal* pleading standard and should be
2 dismissed.

3 As to the direct infringement claims, Quest noted the split of authority among
4 the courts in the Ninth Circuit regarding whether allegations of direct infringement
5 claims need to comport with Form 18 only. *Id.* at 6:4-17 (quoting *RPost Holdings,*
6 *Inc. v. Swiss Post*, No. 2:10-cv-09880, slip op. at 3 (C.D. Cal. July 12, 2011)). This
7 issue, along with the Federal Circuit's opinion in *McZeal v. Sprint Nextel Corp.*, 501
8 F.3d 1354 (Fed. Cir. 2007), has already been considered by this Court.⁴ In
9 *Smartmetric*, this Court examined *McZeal* and existing case law and required that the
10 allegations "identify adequately which of Defendants' products or components of
11 Defendants' products [are] alleged to do what the [patent-in-suit] does." *Id.* at 6. (Ex.
12 1 at 9.)

13 This is the precise argument Quest made in its Memorandum. Quest Mem. at
14 6-7. Medsquire's Complaint is devoid of any factual content to support a reasonable
15 inference that Quest's Care360 system infringes the patent-in-suit. Medsquire's
16 insistence that it only needs to identify Care360 system as the accused system is
17 inconsistent with this Court's ruling in *Smartmetric* and should be rejected.

18 **C. Medsquire's Other Miscellaneous Arguments Are Meritless.**

19 The remaining arguments in Medsquire's Opposition do not merit serious
20 consideration.

21 Medsquire argues that the Court should overlook the deficiencies in its
22 Complaint because it offered to provide an infringement claim chart and has provided
23 one to at least six defendants. Pl.'s Opp'n at 3:25-4:1. This argument underscores the
24 deficiencies of Medsquire's Complaint in failing to provide fair notice of its claims to
25 the defendants. Those defendants to whom Medsquire has not provided claim charts

26 ⁴ In *Smartmetric*, the Court noted the "less demanding" standard applicable to the *pro*
27 *se* pleading in *McZeal* and that the *pro se* plaintiff in *McZeal* "described the means by
28 which defendant allegedly infringed plaintiff's patent." The Court agreed with Judge
Fogel that the "plausible claim for relief" standard from *Iqbal* "alters the evaluation of
the sufficiency of a complaint." *Smartmetric*, slip op. at 5. (Ex. 1 at 8.)

1 are still left in the dark as to the factual bases of Medsquire's infringement claims. If
2 Medsquire believes providing such a claim chart can cure the deficiencies in its
3 Complaint, it should have included its contents (or summary thereof) in the
4 Complaint. Further, while a claim chart may inform defendants of the nature of
5 Medsquire's direct infringement claims, a claim chart is unlikely to address the
6 requisite elements of the contributory infringement claim or the inducement to
7 infringe claim.

8 Medsquire ironically complains that the effort it would take to bring the
9 Complaint in compliance with the pleading standards constitutes unnecessary "'make-
10 work' that needlessly drives up the cost of litigation." *Id.* at 3:28-4:1. It is Medsquire
11 that filed the Complaint that fails to provide sufficient notice of its claims. It is
12 Medsquire that refuses to amend the Complaint despite the clear case law dismissing
13 similarly deficient complaints. Medsquire's refusal to comply with the accepted
14 pleading standards of this Court and this District is what needlessly is driving up the
15 cost of this litigation.

16 **III. MEDSQUIRE'S "ASIDE" ALLEGING DEFAULT BY THE JOINING**
17 **DEFENDANTS IS GROUNDLESS AND SHOULD BE DISREGARDED.**

18 Plaintiff asserts, "as an aside," that all eleven Defendants that joined Defendant
19 Quest's Motion to Dismiss (the "Joining Defendants")⁵ are in default because they
20 only *joined* Quest's Motion and did not separately move to dismiss. Plaintiff cites no
21 authority for this proposition. Plaintiff's argument appears to be that the Joining
22 Defendants only joined in Quest's Motion for Plaintiff's claims against *Quest* to be
23 dismissed. This argument lacks merit.

24 First, the Joining Defendants certainly could have each separately filed a
25

26 ⁵ The Joining Defendants are Hewlett-Packard Company, Nextgen Healthcare
27 Information Systems, Henry Schein Medical Systems, EClinical Works, Med3000,
28 Pulse Systems, Compulink Business Systems, Navinet, SucessEHS, AthenaHealth,
and Aprima Medical Software.

1 motion for dismissal – each which would have been identical to Quest’s Motion apart
2 from the names of the Defendant and associated accused product. Instead, in the
3 interest of efficiency and the conservation of private and judicial resources, and
4 consistent with customary practice, the Joining Defendants together filed a Joinder in
5 Quest’s Motion (Doc. No. 43) (the “Joinder”). Joining Defendants utilized this
6 efficient practice in order to effectuate their joinder while avoiding unnecessary,
7 duplicative filings. Defendants’ Joinder clearly reflects that each Joining Defendant is
8 thereby separately moving for the dismissal of Plaintiff’s individual claims as against
9 each joining Defendant. Were this not the case, nearly the entire substance of the
10 Joinder would make no sense. For example, the express articulation that “Plaintiff
11 Medsquire, LLC’s claims against each joining defendant are identical to its claims
12 against Quest except for the name of the accused product, and therefore, they are
13 deficient for the same reasons stated in Quest’s Motion,” would serve no purpose if
14 the Joinder, as Plaintiff suggests, merely amounts to group support to dismiss the
15 claims against Quest. Notice of Joinder at 2. (Doc. No. 43.) The same is true with
16 respect to the Joinder’s separate enumeration of the particular paragraphs of the
17 Complaint that apply to each individual Joining Defendant. *Id.*

18 Clearly, the Joining Defendants have not failed to “plead or otherwise defend,”
19 and are therefore not in default. Fed. R. Civ. P. 55(a). All Joining Defendants have
20 explicitly and timely represented that Plaintiff’s claims are infirm as against
21 themselves, and specifically adopted the argument and authorities in Quest’s Motion
22 in this regard. Such individualized challenge to the sufficiency of the Complaint by
23 each Joining Defendant precludes a default. *See Rashidi v. Albright*, 818 F. Supp.
24 1354, 1355-56 (D. Nev. 1993) (“it is generally held that challenges to matters such as
25 service, venue and the sufficiency of the complaint preclude a default even if pursued
26 in the absence of a responsive pleading. ... It is undisputed that a motion challenging a
27 complaint for failure to state a claim upon which relief can be granted falls squarely
28 within the ambit of the phrase ‘otherwise defend.’”). This is therefore not a case in

1 which the Joining Defendants have failed to respond to the Complaint. *See Giampaoli*
2 *v. Califano*, 628 F.2d 1190, 1193 (9th Cir. 1980). Further, all Joining Defendants
3 participated in the preparation of the Joint Pretrial Report. *Cf.* Fed. R. Civ. P. 16(f)(1)
4 (authorizing entry of default for failure to participate in pretrial conference or
5 scheduling procedures). Therefore, Plaintiff's "aside" should be disregarded.

6 As to Plaintiff's response regarding Aprima specifically, Plaintiff's argument
7 that the Federal Rules prevent the filing of a motion to dismiss after an answer
8 deadline has passed is baseless. Plaintiff cites no authority for its position. Moreover,
9 Plaintiff fails to address the universal case law directly on point in support of Aprima.

10 Specifically, "motions to dismiss are permissible and timely even when filed
11 after an answer was due and without an extension of time." *Mat-Van, Inc. v. Sheldon*
12 *Good & Co. Actions, LLC*, 2007 WL 2206946, at *3 (C.D. Cal. July 27, 2007) (citing
13 *Luv N' Care, Ltd. v. Babelio, S.A.*, 306 F. Supp.2d 468, 471-73 (S.D.N.Y. 2004); *In re*
14 *Union Nat. Bank & Trust Co. of Souderton, Pa.*, 287 F. Supp. 431, 433 (E.D. Pa.
15 1968); *Koncewicz v. East Liverpool City Hospital*, 31 F. Supp. 122 (W.D. Pa. 1940);
16 *Marbly v. Home Properties of New York*, 183 F. Supp. 2d 950, 954 (E.D. Mich.
17 2002)). Accordingly, Aprima's standing before the Court is not affected by the timing
18 of its motion to dismiss after the expiration of its answer deadline. Aprima's Joinder
19 in Quest's motion to dismiss should be considered along with the Joining Defendants'
20 Joinder and Quest's motion to dismiss.

21 **IV. CONCLUSION**

22 In view of the foregoing, Quest and Joining Defendants respectfully submit that
23 Medsquire's Complaint should be dismissed for failure to state a claim upon which
24 relief can be granted.

1 Dated: August 29, 2011

Respectfully Submitted,

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